Kaefer Malaysia Sdn Bhd v Eshwara MMU (M) Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D6–22–1498 OF 2003
AMELIA TEE ABDULLAH JC
22 JUNE 2010

Contract — Sale of goods — Claim for payment for goods delivered — Agreement to set off payments — Counterclaim based on difference between amount claimed and amount owed — Whether plaintiff entitled to amount due from first defendant — Whether first defendant entitled to amount due from plaintiff

The plaintiff entered into an agreement to sell and supply thermal insulation materials, equipment and related services to the first defendant for two projects, namely the Manjung Power Station project ('MPS project') and the Port Dickson project ('PD project'). It was a term of this agreement that the first defendant would pay for the goods supplied and services provided after the plaintiff had taken into account payments that were to be made by it to the first defendant in respect of transactions between the two parties in respect of three projects, namely, the BPC-BDO, the MLNG-Tiga, and the Prai Power Station projects. The plaintiff's claim against the first defendant was for a sum of RM977,459.60 due and owing in respect of the goods supplied and services provided and a declaration that the BPC-BDO contract between the parties was null and void. In respect of the amounts due under the MPS and PD projects, out of a total sum of RM1,470.169.30 claimed a sum of RM1,450,380.10 was agreed between the parties as due and owing leaving a sum of RM19,789.20 in dispute. It was the first defendant's defence that the sum of RM19,789.20 referred to an order for aluminum cladding, which was not received by it. However, the plaintiff submitted that this dispute was not a genuine one as the first defendant had only raised the issue about the non-delivery of the aluminum cladding almost two years later after it realised that the plaintiff was unable to produce copies of the delivery orders pertaining to the same. Although it was the plaintiff's case that Andrew Thomas Ward ('the second defendant'), a former managing director of the plaintiff company, was involved with the first defendant in a conspiracy to defraud the plaintiff, it was no longer proceeding against him. The first defendant also counterclaimed a sum of RM377,398.71 being the difference between various amounts owing to it by the plaintiff and the amount it owed to the plaintiff. It was also the plaintiff's case that there was no agreement between the parties on the rate of manpower and the rental of equipment and that the BPC-BDO contract between them was null and void. The managing director of the plaintiff ('the MD'), during the material time, testified that the manpower rates and the

rental rates for equipment were excessive and not in accordance with the applicable market rate at the material time. The MD testified that the first and second defendants were in a close relationship which had led the latter to act in breach of the fiduciary duty owed to the plaintiff and allegedly accepting the first defendant's offer for the supply of manpower and equipment. The plaintiff further submitted that there was no written record of any written agreement between the parties on the labour rates and equipment rental rates for the BPC-BDO project. It was the first defendant's contention that the manpower and labour equipment rates had been agreed to by the plaintiff and that there was no conspiracy to defraud between it and the second defendant. The first defendant's site manager testified that the first defendant was the plaintiff's subcontractor for the BPC-BDO project and explained how the rates for manpower and labour equipment as imposed by the first defendant were calculated. The first defendant also relied on its letter dated 5 December 2001 and the reply signed by the second defendant, in his capacity as managing director of the plaintiff company dated 7 December 2001, as its basis for maintaining that there was an agreement between the parties on the labour and equipment.

Held, allowing the first defendant's counterclaim with costs:

(1) In the present case, the first defendant did not dispute its liability to pay. In its letter dated 7 October 2002 which amounted to an admission of the sum of RM1,470,169.30, as claimed by the plaintiff, the first defendant was only asking for time to pay as it was in the midst of legal actions to recover outstanding amounts from its clients. The first defendant's failure to dispute the amount due and owing because of the non-delivery of the aluminum cladding at the time when the sum was claimed only supported this finding. As such, the first defendant was liable to pay the sum of RM1,470,169.30 that was due and owing to the plaintiff in respect of the MPS and PD projects (see paras 65–66).

(2) The plaintiff company's inability to find the second defendant's letter of reply dated 7 December 2001 did not mean that the second defendant had not issued the said letter. Based on the totality of all the evidence adduced there was no doubt that the plaintiff through the second defendant had in fact agreed to the labour rates and equipment rental rates as quoted by the first defendant (see paras 76–79).

(3) Looking at the totality of the evidence adduced, the plaintiff had not succeeded in proving that there was a conspiracy between the second defendant and the first defendant to injure the plaintiff. In fact, evidence as to the actions of the second defendant in directing the first defendant to demobolise labour in order to save costs and the lack of

any positive action against the second defendant by the plaintiff points to there being no such conspiracy (see paras 85 & 87).

(4) The plaintiff was not entitled to offset its backcharges against the first defendant when the latter was merely contracted to supply labour or rental equipment with no specific scope of work (see para 90).

(5) As the total amount due to the first defendant from the plaintiff is greater than the amount owed by the first defendant to the plaintiff, the first defendant's counterclaim of RM357,609.51 was allowed with interests and costs (see para 91).

[Bahasa Malaysia summary

Plaintif menandatangani suatu perjanjian untuk menjual dan membekal bahan-bahan penebatan terma, peralatan dan perkhidmatan-perkhidmatan yang berkaitan kepada defendan pertama untuk dua projek, iaitu projek stesen janakuasa Manjung ('projek SJM') dan projek Port Dickson ('projek PD'). Adalah menjadi terma perjanjian bahawa defendan pertama harus membayar bagi barangan yang dibekalkan dan perkhidmatan-perkhidmatan yang diberikan selepas plaintif mengira bayaran-bayaran yang harus dibuat kepada defendan pertama berkaitan urus niaga antara kedua-dua pihak berkaitan tiga projek, iaitu projek BPC-BDO, MLNG-Tiga dan stesen janakuasa Prai. Tuntutan plaintif terhadap defendan pertama ialah untuk jumlah RM977,459.60 terakru dan terhutang berkaitan barangan yang dibekalkan dan perkhidmatan-perkhidmatan yang diberikan dan juga suatu perisytiharan bahawa kontrak BPC-BDO antara pihak-pihak adalah batal dan tak sah. Berkaitan jumlah terakru di bawah MPS dan projek PD, daripada jumlah RM1,470,169.30 yang dituntut, jumlah RM1,450,380.10 dipersetujui antara pihak-pihak sebagai terakru dan terhutang dan meninggalkan baki sebanyak RM19,789.20 yang dipertikaikan. Adalah menjadi pembelaan defendan pertama bahawa jumlah RM19,789.20 adalah merujuk kepada pesanan salutan aluminium, yang tidak diterima oleh defendan pertama. Walau bagaimanapun, plaintif menghujah bahawa pertikaian ini tidak dibuat dengan ikhlas kerana defendan pertama hanya membangkitkan isu tiada penghantaran salutan aluminium setelah hampir dua tahun ia menyedari bahawa plaintif tidak boleh mengeluarkan salinan-salinan pesanan penghantaran salutan aluminium tersebut. Walaupun menjadi kes plaintif bahawa Andrew Thomas Ward ('defendan kedua'), bekas pengarah urusan syarikat plaintif, yang terlibat dengan defendan pertama dalam konspirasi untuk menipu plaintif, ia tidak lagi meneruskan tindakan terhadapnya. Defendan pertama juga menuntut balas sejumlah RM377,398.71 sebagai perbezaan antara beberapa jumlah yang terhutang kepadanya oleh plaintif. Juga menjadi kes plaintif bahawa tiada perjanjian antara pihak-pihak tentang kadar pekerja dan sewa peralatan dan bahawa kontrak BPC-BDO antara mereka terbatal dan tak sah. Pengarah urusan plaintif ('MD'), dalam masa yang material, memberi keterangan bahawa kadar pekerja dan sewa peralatan adalah keterlaluan dan tidak

mengikut kadar pasaran pada masa material itu. MD memberi keterangan bahawa defendan pertama dan kedua mempunyai hubungan rapat yang mengakibatkan defendan kedua melanggar kewajipan fidusiari kepada plaintif dan dikatakan menerima tawaran defendan pertama untuk membekalkan pekerja dan peralatan. Plaintif selanjutnya menghujah bahawa tiada rekod bertulis tentang perjanjian bertulis antara pihak-pihak tentang kadar buruh dan kadar sewa peralatan bagi projek BPC-BDO. Adalah menjadi hujahan defendan pertama bahawa kadar pekerja dan peralatan telah dipersetujui plaintif dan bahawa tiada konspirasi untuk menipu antaranya dan defendan kedua. Pengurus tapak defendan pertama memberi keterangan bahawa defendan pertama merupakan subkontraktor plaintif bagi projek BPC-BDO dan menjelaskan bagaimana kadar pekerja dan peralatan yang dikenakan oleh defendan pertama dikira. Defendan pertama juga merujuk kepada suratnya bertarikh 5 Disember 2001 dan jawapan yang ditandatangani oleh defendan kedua, dalam kapasitinya sebagai pengarah urusan syarikat plaintif bertarikh 7 Disember 2001, sebagai asasnya untuk menghujah bahawa wujudnya perjanjian antara pihak-pihak tentang pekerja dan peralatan.

Diputuskan, membenarkan tuntutan balas defendan pertama dengan kos:

(1) Dalam kes ini, defendan pertama tidak mempertikaikan liabilitinya untuk membayar. Dalam suratnya bertarikh 7 Oktober 2002 yang mana merupakan pengakuan atas jumlah RM1,470,169.30, seperti yang dituntut plaintif, defendan pertama hanya meminta masa untuk membayar kerana ia sedang dalam proses tindakan perundangan untuk mendapat semula wang yang terakru daripada pelanggan-pelanggannya. Kegagalan defendan pertama mempertikaikan jumlah yang terakru dan terhutang berikutan tiada penghantaran salutan aluminium pada masa jumlah tersebut dituntut mengukuhkan lagi keputusan ini. Oleh itu, defendan pertama bertanggungan membayar sejumlah RM1,470,169.30 yang terakru dan terhutang kepada plaintif berkaitan projek-projek SJM dan PD (lihat perenggan 65–66).

(2) Kegagalan syarikat plaintif mencari surat jawapan defendan kedua bertarikh 7 Disember 2001 tidak bermaksud bahawa defendan kedua tidak menghantar surat tersebut. Berdasarkan keseluruhan keterangan yang dikemukakan, tiada keraguan bahawa plaintif, menerusi defendan kedua telah bersetuju atas kadar pekerja dan sewa peralatan seperti yang disebut harga oleh defendan pertama (lihat perenggan 76–79).

(3) Melihat kepada keseluruhan keterangan yang dikemukakan, plaintif telah berjaya membuktikan bahawa terdapat konspirasi antara defendan kedua dan pertama untuk menjejaskan plaintif. Malah, keterangan terhadap tindakan defendan kedua mengarahkan

defendan pertama memberhentikan khidmat kerahan untuk menjimatkan kos dan tiada tindakan positif terhadap defendan kedua oleh plaintif menunjukkan tiada konspirasi sebegitu (lihat perenggan 85 & 87).

(4) Plaintif tidak berhak untuk mengimbang balas bayaran terakrunya terhadap defendan pertama apabila defendan pertama hanya membekalkan pekerja atau peralatan sewa tanpa adanya skop kerja khusus (lihat perenggan 90).

(5) Disebabkan jumlah keseluruhan kepada defendan pertama daripada plaintif adalah melebihi jumlah yang terhutang oleh defendan pertama kepada plaintif, tuntutan balas defendan pertama sebanyak RM357,609.51 dibenarkan dengan faedah dan kos (lihat perenggan 91).]

Notes

For a case on claim for payment for goods delivered, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 5121.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)
Hock Hua Bank (Sabah) Bhd v Lam Tat Ming & Ors [1995] 4 MLJ 328, HC (refd)
Seagate Technology (S) Pte Ltd & Anor v Heng Eng Li & Anor [1994] 1 SLR 534, HC (folld)

Sathya Kumardas (Shearn Delamore & Co) for the plaintiff.
V Ganesalingam (Ganesalingam Vijayaratnam & Co) for the first defendant.

Amelia Tee Abdullah JC:

[1] The plaintiff, Kaefer Malaysia Sdn Bhd, is a company involved in the import and export of goods and the supply of thermal insulation materials. The plaintiff's claim against the first defendant, Eshwara MMU (M) Sdn Bhd, is for a sum of RM977,459.60 due and owing in respect of goods supplied and services provided and a declaration that the BOC-BDO contract between the parties is null and void. The plaintiff's claim against the second defendant, Andrew Thomas Ward ('Ward'), a former managing director of the plaintiff, is for an order to indemnify the plaintiff in the event that the plaintiff is found liable to pay the first defendant at the rates as claimed by the latter for the said BPC-BDO contract. The plaintiff also claims damages against both defendants for conspiracy to defraud. In light of the fact that Ward had not been successfully served and was consequently not before the court, the plaintiff had informed the court at the onset of the case that it was no longer proceeding against him.

[2] The plaintiff's claim is disputed by the first defendant who contends the labour rates and equipment rental imposed by them had been agreed to by the plaintiff. It denies that there was any conspiracy to defraud and instead counterclaims for a sum of RM377,398.71 being the difference between the amount owing to the plaintiff for the 'Manjung Power Station' and 'Port Dickson' projects and various amounts owing to them by the plaintiff.

AGREED FACTS AND ISSUES

[3] A statement of agreed facts has been filed by the parties and this has helped considerably to crystallise the issues to be decided by the court. It is an agreed fact that in or around January 2002 until May 2003, at the request of the first defendant, the plaintiff agreed to sell and supply thermal insulation materials, equipment and related services to the first defendant for two projects known as the Manjung Power Station and Port Dickson projects. It is a term of the said agreement that the first defendant shall pay to the plaintiff for goods supplied and services provided in respect of the Manjung Power Station and Port Dickson projects after the plaintiff has taken into account payments that were to be made by them to the first defendant in respect of transactions between the two parties in respect of the following projects:

(a) 'BPC-BDO';

(b) 'MLNG-Tiga';

(c) 'Prai Power Station'; and

(d) 'Lumut Power Station'.

[4] The parties had agreed that in respect of the Manjung Power Station and Port Dickson projects, goods totaling RM1,450,380.10 had been supplied by the plaintiff to the first defendant. Thus, out of the total of RM1,470,169.30 claimed by the plaintiff, only a sum of RM19,789.20 remains in dispute.

[5] As regards the amounts due from the plaintiff to the first defendant which was to be set off from the amounts due to the plaintiff for the Manjung Power Station and Port Dickson projects, the amount due in respect of the BPC-BDO project is clearly in dispute. As regards the MLNG-Tiga project, although a sum of RM5,700 appears in the list of issues to be tried, however this issue did not appear to be addressed by either party. As regards the Prai Power Station project, the plaintiff had subsequently conceded this claim although it had initially disputed the RM18,993.70 claimed. And finally, as regards the Lumut Power Station project, it is an agreed fact that a sum of RM35,000 is payable under this head.

THE PLAINTIFF'S CASE

[6] The plaintiff's case is adduced through three witnesses. Naveen Kad

('PW1') was the managing director of the plaintiff from May 2003 until December 2008. Prior to his employment with the plaintiff, he was employed by Iryas Inc (M) Sdn Bhd ('Iryas') from 1999 until May 2003 as project manager and later as project director.

[7] According to PW1, the plaintiff was awarded a contract for the supply and installation of installation works (equipment) in the BPC-BDO project by Dialogue E & C Sdn Bhd ('Dialogue') in December 2001. Dialogue was the main contractor for the project. Clause 3 of the letter of award issued to the plaintiff states that the contract price is an 'all inclusive non escalating lump sum' of RM2,577,414.74. The total fixed sum agreed between Dialogue and the plaintiff for the supply of labour in respect of the BPC-BDO project is RM355,618.60 + RM356,663.29 + RM 204,516.00 = RM916,797.89.

[8] The first defendant was engaged by the plaintiff as a subcontractor for the supply of labour and equipment in respect of the BPC-BDO project. It is the plaintiff's case that they first knew that the first defendant was claiming a sum of RM1,848,785.12 when it received the letter dated 30 April 2003 (P1) attaching the claims summary. PW1 agreed that the plaintiff, after receiving this letter on 30 April 2003 only responded to it on 21 July 2003 (P11). Although there was a dispute as to the manpower labour rate as well as the equipment rental rate, there was no dispute as to the total number of manhours and the total number of rental equipment. PW1 offered the explanation that the plaintiff had taken a long time to respond because they had to go through their own records at the project site as well as refer to site personnel to verify the claim as no documents were available at the plaintiff's office. Although Ward's effective last day of employment was 30 November 2003, they were unable to confirm with him on the amount claimed by the first defendant because Ward had left the office and was on his six months' notice period. PW1 confirmed that the plaintiff did not ask Ward whether he had agreed with the manpower and equipment rates. In fact, the plaintiff did not ask Ward anything at all.

[9] The plaintiff's letter terminating Ward's employment (P13) shows that although the letter was signed on 16 May 2003, his termination was effective 30 November 2003 but he was to cease acting for the plaintiff with immediate effect. The final payment of £15,592.12, which constituted his final settlement sum, was made to Ward on 15 January 2004. PW1 confirmed that no show cause letter was ever issued to Ward.

[10] PW1 testified that the plaintiff had no record of any invoices having been forwarded by the first defendant. If such invoices were received, they would have been sent to accounts for verification and payment. PW1 had checked with accounts and confirmed that no such invoices from the first defendant were ever forwarded to accounts for verification.

[11] PW1 was referred to the invoices at pp 54–73 of bundle 1 which were allegedly acknowledged received by Ward. According to PW1, it was odd for Ward as managing director to have personally signed and accepted those invoices when it was the operations manager or contracts manager who should have accepted the invoices, verified their contents, approved them, and then forwarded them to accounts for approval, verification and payment.

[12] PW1 testified that the plaintiff had no record of any written agreement entered into between the plaintiff and the first defendant in respect of the rate of manpower and rental of equipment pertaining to those invoices. He was referred to the first defendant's letter dated 5 December 2001 (D2A & D2B) addressed to the plaintiff quoting their rates for manpower supply and equipment rentals together with a letter dated 7 December 2001 signed by Ward (D2C) which allegedly suggests an agreement between the parties on the rate of manpower and rental of equipment. PW1 told the court that the plaintiff had no record of either D2A & B or D2C in their files. He explained that the plaintiff had an internal procedure in place whereby all letters issued for and on behalf of the plaintiff will have a specific number assigned and the details of each letter must be manually recorded in the correspondence log register by the sender to enable the sender to track when and to whom the letter was sent. The system would also ensure that the plaintiff has a complete record of all letters issued by its officers and employees and will be able to verify the authenticity of its letters. Referring to extracts from the plaintiff's correspondence log register (P2), PW1 pointed out that there is no record of any letter dated 7 December 2001 being issued by Ward to the first defendant on that date.

[13] The court notes that when asked why the plaintiff still paid Ward his full salary after they had sight of the 7 December 2001 letter (D2C), PW1's answer was that it was doubtful whether the said letter was issued as there were doubtful reference numbers and also a reference to a different letter.

[14] PW1 further testified that the plaintiff had another internal procedure in place whereby an official purchase order will be issued when the plaintiff confirms an order from any of its suppliers. He referred to the plaintiff's purchase log numbering system (P3) where it can be noted that no purchase order was issued by the plaintiff to the first defendant on 7 December 2001 in respect of the alleged agreement for the supply of manpower and equipment.

[15] During cross-examination, PW1 was referred to the defendant's letter dated 9 January 2002 to the plaintiff (p 52 of the common bundle) giving its quotation for materials for the BASF-Petronas BDO project as well as the plaintiff's reply to the defendant dated 17 January 2002 (p 53) to supply the materials as per their quotation. A cross check with the extract of the

correspondence log register would reveal that the plaintiff's letter at p 53 is not registered at p 16 of the extract. Neither does it appear in the purchase log numbering system (P3).

[16] Another discrepancy pointed out by PW1 is that Ward's letter (D2C) makes reference to the first defendant's letter reference No 'emu-kaefer-bdo-q01-03 dated 5 December 2001'. However a closer look at D2A reveals that this letter bears reference No 'emu-kaefer-bdo-q01-01'. The plaintiff thus took the position that there was no agreement between the parties on the rate of manpower and the rental of equipment.

[17] PW1 further testified that the first defendant had only produced the letter for the first time in September 2003 when they affirmed an affidavit for the injunction application. This was after Ward had resigned on 16 March 2003.

[18] With reference to the first defendant's quotation and rates (D2A & D2B), PW1 pointed out that the first defendant's offer was not beneficial to the plaintiff. According to him, it is common practice in the industry for the basis of the subcontract to follow that of the main contract. Since the insulation works awarded by Dialogue to the plaintiff was on a fixed price basis, it was common practice for the subcontract to be also based on fixed price as opposed to hourly rates. He further pointed out that the plaintiff had in fact made an offer to another company called TITA Sdn Bhd on 7 March 2002 on a fixed unit price (P4). However, during cross-examination, he agreed that it was not a hard and fast rule that a subcontractor who gets a project on a lump sum basis must also subcontract out on a lump sum basis.

[19] PW1 had testified that the flat rate of RM12 per hour imposed by the first defendant was not in accordance with the applicable market rate at the material time. The market rate for manpower varied depending on the grade of the worker. The hourly rate for a general worker is RM5; insulator is between RM6–RM7; tinsmith/fabricator is RM8; supervisor is RM12. He claimed that his evidence on manpower rates is based on his years of experience in the oil and gas construction business in Malaysia. In addition, his former employer, Iryas, was also awarded a contract by Dialogue to do insulation works (piping) in the BPC-BDO project in Kuantan. PW1 also offered various examples of invoices issued by other companies. Indah Tenaga Teknologi Abadi's invoice dated 14 June 2002 (P5) to the plaintiff quotes RM10 for a welder and RM6.50 for a semi-skilled worker. He agreed that the RM6.50 and RM10 cited above were manpower standby rates where the manpower does not do any work but is on standby. PW1 was also referred to Dialogue's work order to the first defendant (D5) for the BPC-BDO project and he agreed that the rates paid by Dialogue

to the first defendant were in fact higher than the rates claimed by the first defendant from the plaintiff for the same project.

[20] As regards the first defendant's rental rate for equipments, it is PW1's evidence that the first defendant's rates were excessive and not in accordance with the applicable market rate at the material time. Reference was made to the plaintiff's purchase order for equipments from CMZ (Machinery) Ltd (P6) where it was pointed out that the plaintiff could have purchased the equipments at the rental rates offered by the first defendant. When asked why he did not confront Ward about this, PW1 explained that they were still trying to establish where the first defendant got those rates from. The plaintiff did not know if Ward had agreed with the first defendant on those rates. In any event, Ward was not really co-operating with the plaintiff by that time. He disagreed that it was more advantageous to rent rather than buy equipment but maintained that for insulation equipment, they preferred to buy rather than to rent.

[21] PW1 testified that the plaintiff had reason to believe that the first defendant and Ward were in a close relationship which had led Ward to act in breach of the fiduciary duty owed to the plaintiff by allegedly accepting the first defendant's offer for the supply of manpower and equipments. He claimed that Ward, whilst holding the position of managing director of the plaintiff, had a second hand motorcycle registered under his name but with an address under the first defendant. This is shown in the Road Transport Department search document at p 13 of bundle 3 (P7). The search was done on 24 June 2003. However, the plaintiff did not confront Ward about this.

[22] PW1 testified that the total sum paid by Dialogue to the plaintiff is RM1,655,192.84. A reduction was made from the original contract sum as Dialogue was unhappy with the performance and quality of work rendered by the plaintiff. A total sum of RM1,087,310.10 was imposed by Dialogue for back charges and, in turn, the plaintiff imposed a sum of RM461,248.75 on the first defendant for having to supplement labour for the construction of the boiler and combustion chamber.

[23] PW1 told the court that he had checked with his staff and had learnt that most of the purchase orders from Ward were issued from his own computer. PW1 was thus unable to produce the purchase orders for the other projects. He was also not able to find the document to evidence that Dialogue had charged the plaintiff RM461,248.75 to supplement labour. He denied that he was deliberately not disclosing the document because it might not show that a sum of RM461,248.75 was in fact charged to supplement labour.

[24] PW1 denied that the backcharges imposed by Dialogue were attributable solely to the plaintiff's failure to deliver materials on time or that the first defendant was unaware of complaints by Dialogue in respect of the supply of labour. On the contrary, Dialogue had many site meetings which were attended by the first defendant's site manager where Dialogue had expressed dissatisfaction with the slow progress in which the first defendant was completing the works as well as the lack of manpower. Various letters were produced (p 9 A-F) in support of his evidence that there were numerous complaints about the sufficiency and quality of the manpower supplied.

[25] PW1 explained that even though there was no official agreement for the supply of materials between Ward and the first defendant, the plaintiff was not disputing the claim for the supply of materials because they had the records to verify such dealings in their accounts as well as site records. In saying that 'there was no hard and fast rule', PW1 went on to say that there could be incidents of jobs being done by the subcontractor which cannot be measured simply by area or volume. Such jobs, called ad hoc jobs, are given on the basis of hourly rates whereby the ceiling is given by the client with respect to maximum amount and maximum manhours that could be spent for completing that work.

[26] In respect of the Manjung Power Station project, the remaining dispute between the parties pertains to the plaintiff's claim for a sum of RM19,789.20 in invoice No 3002/02–7032 in respect of the delivery of aluminium cladding (P10). Reference was made to three delivery orders Nos 52314, 52315 and 52316 issued by VAW Aluminium Industries Sdn Bhd for the delivery of aluminium cladding to the first defendant. PW1 admitted that the plaintiff had not kept a copy of the said delivery orders which were acknowledged receipt by the first defendant as there was no dispute about delivery at the material time. In any event, when the plaintiff requested for confirmation of intent and immediate action to pay overdue amounts including the sum due under invoice 3002/02–7032 (which in turn includes the amount of RM19,789.20 in dispute), the first defendant in its response at p 11 of AB did not dispute delivery of the aluminium cladding but merely asked for time to settle the outstanding sum.

[27] The plaintiff's second witness was Ishwar Gupta ('PW2'), its contract manager. Prior to his employment with the plaintiff he was employed by Iryas from December 2000 to the end of 2003 as a planning engineer.

[28] PW2 testified as regards his involvement with the BPC-BDO project in Kuantan. Iryas was awarded a contract for the supply and installation of insulation works (piping) in the BPC-BDO project by the main contractor, Dialogue. PW2 was the planning engineer for the said project.

[29] PW2 had worked as a planning engineer in Malaysia for eight years and expressed himself to be aware of the applicable market rates for the supply of labour. According to him, the hourly rate for a general worker is RM5; insulator is between RM6–RM7; tinsmith is RM8 and supervisor is between RM12–RM15. During cross-examination, he agreed that the rates appearing in D5 (the work order issued by Dialogue to the first defendant in respect of the BPC-BDO project) were far higher than the rates given by him in court.

[30] As regards equipment rental charges, it is PW2's evidence that the equipment rental rates as stated in D2B were also not in accordance with the market rate. According to him, the rental charges based on market rate are as follows:

(a) Bending/rolling/circular bending/seam swagger machine: RM300–RM400 per month;

(b) Small lock former: RM450–RM500 per month;

(c) Big lock former: RM600 per month;

(d) Beading machine: RM150–RM200 per month; and

(e) Electric guillotine sheer: RM400–RM600 per month.

These were also the rates used by Iryas in respect of the insulation works (piping) for the BPC-BDO project.

[31] The plaintiff's third witness Mohammad Kamal bin Md Yosof ('PW3') was employed by the plaintiff as the operations manager at the material time. He told the court that he was not aware of any agreement between the plaintiff and the first defendant on the rates for manpower or for the rental of equipment.

[32] PW3 testified that he first knew about the first defendant's claim when he received their final summary of claims dated 30 April 2003 (P1) sometime in May 2003. P1 sets out, inter alia, the labour rates and rental charges for equipments. Upon receipt of P1, PW3 had issued a letter dated 21 July 2003 (P11) disputing the amounts claimed. He explained that the majority of the manpower supplied by the first defendant was general workers, insulators and tinsmiths. After discussing with the managing director, PW1, they decided to take the average of the market rate for the worker which was between RM5–RM8. That was how he arrived at the rate of RM6.50 per hour for supply of labour.

[33] As regards the rental rates for equipment stated in para 2 of P11, PW3 explained that the rates were based on the market rate at the material time.

[34] PW3 testified that Dialogue had imposed back charges on the plaintiff for having to supplement direct labour to support the first defendant's workers for the completion of the boiler and combustion chamber works. Dialogue engaged a company called Cape East to supply labour to do the works as the first defendant lacked manpower. The total charges imposed by Dialogue were RM461,246.75 and this is reflected in the last column of attachment A2 attached to DW3's letter P11.

[35] PW3 testified that according to the plaintiff's calculations, the amount payable for the BPC-BDO project is RM443,909.70. The table at p 7 of bundle 2 shows how that figure was arrived at.

[36] PW3 did not agree that the first defendant was unaware of any complaints by Dialogue in respect of the supply of manpower. Dialogue had held many site meetings which DW3 attended with a Mr Kumar from the first defendant. At these meetings, Dialogue had complained about the delay of work as well as the lack of manpower.

[37] Upon receipt of the first defendant's response to his letter P11, PW3 responded with P12 in which he had asked, inter alia, to be furnished with a copy of Ward's letter dated 7 December 2001 in which Ward had allegedly agreed to the labour manpower rate and equipment rental rate. He told the court that the first defendant never furnished the said letter. Neither did it furnish the plaintiff with copies of their official invoices which they claim had been certified and approved.

[38] During cross-examination, PW3 told the court that he knew Ward since 1995 when Ward had invited him to work in Willich (M) Sdn Bhd where Ward was then the general manager. The first defendant was one of the subcontractors of Willich.

[39] PW3 agreed that that Ward had approached him to discuss the unit rate for labour in respect of the BPC-BDO project. PW3 had expressed his opinion that he did not agree with the rate. He denied that he had full knowledge that Ward had agreed with the first defendant on a figure of RM12 for the unit rate for labour.

[40] PW3 agreed the contract between the plaintiff and the first defendant was a very flexible contract which can be terminated at will without assigning any reasons. The plaintiff would therefore be able to reduce the number of manpower and equipment at will without giving any reasons. PW3 also agreed that the plaintiff had asked the first defendant to demobilise on site on 17 May 2002 in order to hire a cheaper subcontractor. He further agreed that the first defendant was then asked to come back on 24 June 2002. The reason for this

was because of the quality of the labour supplied and the fact that due to financial problems the subcontractor could not accommodate any more workers.

[41] The plaintiff's initial site manager was Encik Wan Azhari Mustaffa. PW3 agreed that Dialogue had asked the plaintiff to remove him and the plaintiff had replaced him with Mr Kumar. He agreed that there were no complaints by Dialogue against Mr Kumar. He agreed that there were instances when Dialogue had delayed in releasing equipment to the plaintiff although he could not remember if these delays were recorded and informed to Dialogue.

THE DEFENDANT'S CASE

[42] The defendant relied only on one witness, namely Kalyan Kumar Balakrishnan ('DW1'). DW1 went into quite some detail as to his qualifications and working experience. He graduated as a mechanical engineer from the Rensellaer Polytechnic Institute in America. He also has a BE in Engineering Science from Hofstra University in New York. Since his graduation, he worked as a mkt service engineer with Lion Tekko from 1995–1999 and as site manager with Best Ukcon from 1999–2001. He joined the first defendant as contract manager in 2002 and left in 2006. He then joined MB Petroleum as business manager from 2006–2007 and is currently a tendering manager with Alstrom Asia Pacific. He admitted that before joining the first defendant he had no experience in insulation work.

[43] The first defendant was a subcontractor of the plaintiff for the BPC-BDO project where the main contractor was Dialogue. At the material time, DW1's was the site manager in relation to the project and his role was to manage the work force on site and to monitor of the works of the clients. DW1 testified that the first defendant supplied labour and rented equipment to the plaintiff pursuant to their letter dated 5 December 2001 (D2A) at the rates specified in Appendix I attached (D2B) which he claimed were accepted by the plaintiff vide their letter dated 7 December 2001 (D2C). The first defendant thus claims a sum of RM1,773,785.11 for the project and refers to the invoices at D3 in support of its case.

[44] The court notes DW1's claim that he had personal knowledge that Ward had issued D2C although he admitted that he did not in fact see Ward actually signing the said letter. He agreed that the reference number quoted in D2C (p 49) ie 'emu-kaefer-bdo-q0l-03' is different from the reference number 'emu-kaefer-bdo-q01-01' in D2A (p 48). He denied that D2C was concocted between the first defendant and Ward.

[45] DW1 did not agree with the suggestion that D2C did not contain the prescribed scope of work. He maintained that the contract was for manpower supply and equipment supply and that a list of the manpower and equipment appears in D2B (p 48A). Upon further questioning, he acknowledged that it was not stated in D2B what the manpower or equipment was for and there was also no fixed amount of manpower in terms of hours and no ceiling price for the agreement. He agreed that in respect of the BPC-BDO project between the parties, there was no letter similar to P4 (pp 18–19), the subcontract document between the plaintiff and TITA Sdn Bhd where there were clear provisions on scope of work, contract price and contract period and liquidated ascertained damages. Reference was also made to D6J (p 93), DW1's letter to the plaintiff, which states, inter alia, that the plaintiff's site personnel had not verified and signed off the daily timesheets as they were under the impression that the contract was based on unit rates.

[46] DW1 told the court that the plaintiff's claim of having no knowledge whatsoever of the labour rate and equipment rental rate until it was exhibited in an affidavit affirmed on 24 November 2003 was not possible because the plaintiff in their letter dated 21 July 2003 had not only stated that they were not agreeable to the labour rate and equipment rental rate as claimed but had quantified the first defendant's total claim for the BPC-BDO project in an attachment thereto. In cross-examination, he agreed that the rates for manpower and equipment rental were all stipulated in the claims summary and that the plaintiff would have knowledge of the rates based on this letter.

[47] DW1 also disputed that the labour rates and equipment rental rates imposed by the first defendant were exorbitant, unreasonable, and much higher than the applicable market rate at the material time. He explained that the rates could be considered high if the contract was for a fixed term, for a fixed number of workers or for a fixed number of equipment for rental. However, the plaintiff did not want a fixed term contract as they wanted the flexibility to terminate the first defendant's contract at will. They also wanted the flexibility of varying the number of workers and equipment based on their requirements. They were thus not tied to a minimum number of workers or a minimum number of manhours per day or a minimum number of equipment rented.

[48] DW1 pointed out that the plaintiff had used this flexibility to its advantage when Ward reduced the number of workers and number of equipment rented beginning from 1 March 2002. He later terminated the first defendant and asked them to demobilise from site effective 17 May 2002. DW1 tendered a letter from the first defendant dated 15 May 2002 (D4) to confirm the demobilisation. He also referred to a letter from the plaintiff dated 17 September 2002 (D1) asking the first defendant not to increase the manpower at the site until further notice notwithstanding Dialogue's request

for an additional 100 men as they needed to control costs. As such, DW1 states that the plaintiff's contention that the contract is unreasonable or disadvantageous to them is misconceived and erroneous.

[49] DW1 further testified that vide work order No BDO-DECSB/EMSB/01 dated 13 November 2002 (D5), Dialogue had asked the first defendant to supply them with labour. DW1 pointed out that the rates offered by Dialogue under that work order were even higher than the rates offered by the plaintiff. According to DW1, the rates were also more attractive as the number of manhours was fixed, the number of each type of worker was fixed and there was also a fixed minimum amount. Thus, when Dialogue issued this work order, it knows exactly what it has to pay the first defendant.

[50] Re the plaintiff's claim for RM461,246.75 allegedly paid by them to Dialogue for having to supplement labour for the BPC-BDO project, DW1 retorted that the claim was totally baseless as the first defendant was only to supply labour and equipment and did not have a specific scope of work under the subcontract. He pointed out that no particulars of Dialogue's alleged claim had ever been furnished to the first defendant. Furthermore, the plaintiff had not, at any time during the duration of the contract, complained about the quality of the labour or the equipment supplied by the first defendant. On the contrary, the contemporaneous letters and facsimile messages available would point to the fact that the problems on site were due to the plaintiff not having adequate materials or weaknesses in the plaintiff's management team. Reference was made to:

(a) A letter dated 14 September 2002 from Dialogue to the plaintiff complaining that a comprehensive report covering all materials was not submitted, and also putting on record that the progress report showed that the plaintiff had only completed 47% and not 61% of the work as claimed (p 8 of AB);

(b) A facsimile dated 24 September 2002 from Dialogue to the plaintiff complaining that the plaintiff had again failed to deliver the required materials with a four week delay and they had to procure materials on the plaintiff's behalf. There was also mention of the fact that the plaintiff was unable to complete the work on the original and even extended schedules and as such Dialogue had no choice but to assist 'Kaefer by putting our own direct hire workers in areas that you had delayed and unable to achieve the realistic completion schedule' (p 8 of AB); and

(c) Various facsimile messages from the first defendant to the plaintiff complaining about the management staff, insufficiency of materials and the shortage of manpower (D6 A-K).

[51] DW1 agreed that since Dialogue had expressed dissatisfaction as regards the work force and work progress on 14 August 2002, 6 September 2002 and 9 September 2002, the first defendant should take some responsibility as they were supplying labour to Dialogue at that time.

[52] DW1 testified that he received the 'most improved subcom supervisor' safety award from the plaintiff (D7). However he admitted during cross-examination that this was an award for safety and not for quality.

[53] DW1 denied that there was a conspiracy between the first defendant and Ward to enter into contracts on terms that were disadvantageous to the plaintiff vide letters dated 5 December 2001 and 7 December 2001. He maintained that the terms were not disadvantageous to the plaintiff and that the conspiracy theory was merely an afterthought by the plaintiff to evade from paying the first defendant. He also pointed that Ward had informed him in February 2004 that he had resigned from the plaintiff with effect from 30 November 2003 and that his resignation was accepted by the plaintiff but the plaintiff had deliberately failed to produce Ward's resignation letter. He was not told by Ward that he was terminated and as such did not ask him for a copy of the letter of termination.

[54] In respect of the claim of RM18,993.70 for the Prai Power Station project, DW1 produced invoice No 2061 dated 11 December 2002 (D8) and delivery orders No KMDO/02–0104 and No 1936 (D9A & B) in evidence that the items invoiced had been delivered directly to the Prai Power Plant. As mentioned earlier, the plaintiff had subsequently conceded on this claim of RM18,993.70 in respect of the Prai Power Station.

[55] In respect of the Manjung Power Station project, the plaintiff claims a sum of RM1,364,507.40. The first defendant contends that their records show that only a sum of RM1,344,718.20 was due to the plaintiff. As such, the only area in dispute between the parties is a sum of RM19,789.20. The first defendant claims that it has no record of materials delivered vide delivery orders Nos 52314, 52315 and 52316 amounting to RM19,789.20 and there is also no acknowledgement receipt issued by them. During cross-examination, DW1 agreed that invoice No 3002/02–7032 for the sum of RM33,598.38 appears as one of the invoices in the plaintiff's letter of demand dated 30 September 2002 (p 10). He agreed that vide the first defendant's letter dated 17 May 2002 (p 11), they had not disputed the amount but had only appealed for time to make payment.

[56] As such, DW1 contends that there is a still a nett amount of RM377,398.71 owing to them. This figure is arrived at by deducting the amount of (RM1,344,718 + RM105,666.90=) RM 1,450,380.10 payable by

the first defendant to the plaintiff from the (RM1,773,785.11 + RM18,993.70 + RM35,000=) RM1,827,778.81 payable by the plaintiff to the first defendant.

EVALUATION OF THE EVIDENCE AND FINDINGS

[57] In coming to a decision in this case, the court has carefully perused the evidence adduced by both parties as well as the documentary evidence relied on in support of their cases. The court has also had the assistance of perusing and hearing the submissions advanced by the parties.

Amounts due from the first defendant to the plaintiff under the Manjung Power Station and Port Dickson projects

[58] The first issue to be determined is the amount that is due from the first defendant to the plaintiff in respect of the Manjung Power Station and the Port Dickson projects. As mentioned earlier, out of a total sum of RM1,470,169.30 claimed in respect of the two projects, a sum of RM1,450,380.10 is agreed between the parties as due and owing. This leaves a sum of RM19,789.20 claimed under invoice 3002/02–7032 (P10) dated 18 September 2002.

[59] The first defendant disputes the receipt of aluminium cladding purportedly delivered vide delivery orders No 52314, No 52315 and No 52316. It is submitted that there is no acknowledgement of receipt for these delivery orders unlike delivery orders Nos 544527 and 544529 (pp 5 and 4 of bundle 3).

[60] It is undoubtedly true that there is a rubber stamp and signature on delivery orders No 544527 and No 544529 which shows that the goods were received by a P Velayanathan at the first defendant's store on 20 August 2002. The court observes that there is no corresponding chop and signature on delivery orders No 52314, No 52315 and No 52316 (pp 23, 22 and 21 of AB).

[61] The court recalls the evidence of PW1 that the plaintiff had not kept a copy of the said delivery orders with the acknowledgement receipt as there was no dispute about delivery at the material time. Also of relevance is the fact that when the plaintiff requested for confirmation of intent and immediate action to pay overdue amounts on 30 September 2002 (p 10 of AB), the first defendant in its response on 7 October 2002 (p 11 of AB) did not dispute delivery but had merely asked for time to settle as they were in the midst of recovering outstanding sums from their clients. The request for payment at p 10 includes the sum due under invoice 3002/02–7032 and this in turn includes the amount of RM19,789.20 for the delivery of aluminium cladding vide delivery orders No 52314, No 52315 and No 52316.

[62] The court also notes the plaintiff's submission that the dispute is not a genuine one as the first defendant had only raised the issue about the non-delivery of the aluminium cladding almost two years later after they realised that the plaintiff was unable to produce copies of the delivery orders containing the acknowledgement receipt. They argue that the first defendant was merely using this to their advantage.

[63] The court notes the case of *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 relied on by the plaintiff. In that case, the appellants had claimed liquidated damages in the sum of RM70,000 against the first respondent and his sureties for breach of a scholarship agreement. In support of their application for summary judgment, the appellants referred to three letters written by the first respondent. Two of the letters contained unequivocal admissions of liability for breach of the agreement. In reply the respondents claimed that the appellants had breached a condition of the agreement to provide the first respondent with a post consistent with his qualifications.

[64] On an O 14 application, the senior assistant registrar was satisfied that there were no triable issues and entered judgment against the respondents. On appeal, the High Court set aside the order of the senior assistant registrar. On further appeal, the Supreme Court held by a majority that having regard to the unequivocal admission of liability under the scholarship agreement to pay the appellants RM70,000 for breach of contract, the learned judge had erred in accepting the assertion of the first respondent that the post given to him was inconsistent with his legal qualification as a triable issue. His Lordship Mohamed Azmi SCJ went on to say that 'Liability was admitted without qualification, and only the mode of payment was in dispute'.

[65] In the present case, although the defendant's letter dated 7 October 2002 falls short of the unequivocal admission of liability as in the case of *Bank Negara v Mohd Ismail*, the court notes that nowhere in the said letter had the defendant disputed their liability to pay. On the contrary, the defendant was only asking for time to pay as they were in the midst of legal actions to recover outstanding amounts from clients. They also proposed that the costs of their providing the plaintiff with labour and management 'could be used to offset the outstanding amount owing to you'.

[66] The court is of the view that the contents of the defendant's letter dated 7 October 2002 amounted to an admission that the amount claimed (which includes the RM19,789.20 in dispute) was due and owing to the plaintiff. The failure of the defendant to dispute that the amount was not due and owing because of the non-delivery of the aluminium cladding at the time when the sum was claimed or at any time soon afterwards would only support the court's finding in this regard. Accordingly, the court finds that the sum of

RM1,470,169.30 as claimed by the plaintiff was due and owing to the plaintiff in respect of the Manjung Power Station and Port Dickson projects.

Amounts due from the plaintiff to the first defendant under the BPC-BDO project

[67] As regards the amount that is due and owing from the plaintiff to the defendant, the court finds that since:

(a) the amount of RM18,993.70 claimed by the first defendant for the Prai Power Station project has been conceded by the plaintiff; and

(b) the sum of RM35,000 claimed for the Lumut Power Station is agreed between the parties,

the only remaining area of contention is the sum of RM1,773,785.11 claimed by the first defendant for the BPC-BDO project.

[68] In para 2 of the amended statement of defence and counterclaim, the first defendant pleads that the amount due to them from the plaintiff in respect of the BPC-BDO projects is RM1,773,785.11. The plaintiff, on the other hand, contends in para 9 of its amended statement of claim that the amount owed by them is only RM443,909.70.

[69] The plaintiff submits that in respect of this issue, the court should consider whether the rates imposed by the first defendant for labour and equipment rental were agreed to by Ward, the plaintiff's former managing director. The first defendant, on the other hand, has submitted that the plaintiff, in its pleadings, had admitted that Ward had confirmed the agreement vide the plaintiff's letter to the first defendant dated 7 December 2001. Was there in fact such an admission?

[70] The court has carefully perused paras 17 and 18 of the amended statement in reply. These paragraphs are reproduced below for ease of reference:

17. Pada atau sekitar bulan Disember 2001, Defendan Kedua secara salah dan dengan niat untuk merosakkan Plaintif dan/atau mengakibatkan kerugian kepada Plaintif melalui cara yang menyalahi undang-undang telah berkomplot dan bersatu bersama-sama dengan Defendan Pertama *untuk kononnya* bersetuju untuk memasukki kontrak bagi membekalkan tenaga pekerja dan peralatan kepada Plaintif dalam Projek 'BPC-BDO' ('Kontrak Yang Dikatakan') berdasarkan terma-terma yang bukan demi kepentingan Plaintif.

18. Selaras dengan dan untuk melanjutkan komplot yang diplid dalam perenggan 17 di atas, Defendan Kedua, dalam kemungkiran kewajipan

fidusiarinya kepada Plaintif, mengesahkan dan menyetujui *Kontrak Yang Dikatakan* melalui surat kepada Defendan Pertama bertarikh 07.12.2001. (Emphasis added.)

[71] Learned counsel for the plaintiff has submitted that these pleadings are not an admission that there was an agreement entered into between the parties. He pointed out that they had used the words 'purported contract' or 'Kontrak Yang Dikatakan' to say that if there was in fact a contract, that contract was entered into by connivance and conspiracy.

[72] The court further notes that the second issue in the statement of issues to be tried as agreed between the parties reads as follows:

2. Whether the labour rates and equipment rental rates imposed by the 1st Defendant for the 'BPC-BDO' Project was agreed to by the Plaintiffs Managing Director, the 2nd Defendant on or about 07.12.2001.

The court thus agrees with learned counsel for the plaintiff that the court should first determine if there was indeed an agreement and if so, whether the first defendant had conspired with Ward to enter into the said agreement.

[73] The first defendant relies on its letter dated 5 December 2001 (D2A) and attachment (D2B) and the reply signed by Ward dated 7 December 2001 as their basis for saying that there was an agreement between the parties on the labour and equipment rental rates. D2A is a letter signed by G Mahandran on the first defendant's letterhead quoting rates for manpower supply and equipments as per Appendix I. Appendix I (D2B), also dated 5 December 2001, fixes the manpower rate at a flat rate of RM12 per hour for all categories of manpower from engineer to general worker. The equipment rate cited differs for different types of equipment.

[74] D2C is a letter addressed to Mr Mahendran on the plaintiff's letterhead and signed by Ward. In this letter, he refers to the first defendant's quotation and directs it to mobilise a ream to their BPC-BDO jobsite. It is stated that the team will be working under the control of 'Kaefer site personnel and should report to Mr Azhari at site as soon as possible'. Although the exact number of personnel to be mobilised was not stated, however it would appear that both the number of personnel as well as equipment requirements would be as decided and confirmed by Mr Azhari.

[75] The court is not unmindful of the contention of the plaintiff that it has no record of any written agreement having been entered into between Ward and the first defendant on the labour rates and equipment rental rates for the BPC-BDO project. The court has given due consideration to PW1's evidence as to the internal procedures apparently in place to register all letters issued for

and on behalf of the plaintiff. The court notes PW1's evidence about the existence of the correspondence log register to track correspondence as well as to verify the authenticity of letters and his further evidence that extracts from the correspondence log register (P2) reveals no record of any letter dated 7 December 2001 being issued by Ward to the first defendant. The court further notes evidence as to the purchase log numbering system whereby an official purchase order will be issued when the plaintiff confirms an order from any of its suppliers and PW1's evidence that the purchase log numbering system (P3) shows that no purchase order was issued by the plaintiff to the first defendant on 7 December 2001 in respect of the alleged agreement for the supply of manpower and equipment.

[76] The court finds that internal procedures, if indeed properly implemented, may well be of assistance in determining the authenticity of D2C and whether it was in fact issued by Ward. However, during cross-examination, it was revealed that other letters of the plaintiff would also appear not to have been registered in either the correspondence log register or the purchase log numbering system. The document in question is the plaintiff's reply to the defendant's quotation in respect of materials for the BASF-Petronas BDO project. A cross check with the extract of the correspondence log register as well as the purchase log numbering system would reveal that the plaintiff's letter at p 53 is not registered in either the extract or the system.

[77] In light of this evidence which would throw some doubt as to the reliability of the aforesaid correspondence log register and purchase log numbering system, the court is unable to conclude that the absence of D2C in both the correspondence log register and the purchase log numbering system indicates that D2C was not a valid letter issued by Ward on behalf of the plaintiff. On the contrary, the court finds that other evidence adduced from the plaintiff's own witness (PW1) which points to the fact that the manner in which Ward managed the business of the plaintiff, or was allowed to manage the business of the plaintiff, would appear to be somewhat lax. The court recalls evidence that most of the purchase orders from Ward were issued from his own computer and that PW1 was thus unable to produce purchase orders for other projects. In light of the above, the court finds that the inability of the plaintiff to find P2C registered in the correspondence log register or the purchase log numbering system does not mean that Ward had not issued the said letter.

[78] The court is aware that D2C makes reference to the first defendant's quotation 'emu-kaefer-bdo-q01-03' whereas the first defendant's letter attaching the quotation (D2A) bears reference No 'emu-kaefer-bdo-q01-01'. Both D2A as well as D2B bears the same date 5 December 2001. The court admits that this discrepancy has caused it some measure of concern. Were there two other letters 'q01-02' and 'q01-03' issued by the first defendant on 5

December 2001 and if so, what were the contents of those letters? Was Ward's letter citing 'q01-03' merely a typographical error?

[79] The court finds that the plaintiff has not produced any evidence or at all to show the existence of any other document which could raise a reasonable doubt that D2C did not refer to the rates quoted in D2B. The court finds that based on the totality of all the evidence adduced, the disparity in the reference number is not such as to lead the court to doubt that the plaintiff, through Ward, had in fact agreed to the labour rates and equipment rental rates as quoted by the first defendant.

Was there a conspiracy between Ward and the first defendant?

[80] Having found so, the court will now consider whether the plaintiff has succeeded in proving that there was a conspiracy between the first defendant and Ward to enter into the agreement with the intention of injuring the plaintiff.

[81] On the issue of conspiracy, the plaintiff has referred the court to the case of *Hock Hua Bank (Sabah) Bhd v Lam Tat Ming & Ors* [1995] 4 MLJ 328. The first defendant, on the other hand refers the court to the Singapore case of *Seagate Technology (S) Pte Ltd & Anor v Heng Eng Li & Anor* [1994] 1 SLR 534. Both authorities are in agreement that in order to make out a case for conspiracy in civil proceedings, the plaintiff has to establish:

(a) that there was an agreement between two or more persons;

(b) the agreement was for the purpose of injuring the plaintiff; and

(c) the acts done in execution of the agreement resulted in injuring the plaintiff.

As regards the standard of proof, the Singapore High Court in *Seagate Technology* relied on by the first defendant held that 'a high degree of proof is required'.

[82] The plaintiff had pointed out that the agreement with the first defendant was not beneficial to them. The letter of award issued to the plaintiff by Dialogue states that the contract price is an 'all inclusive non escalating lump sum' of RM2,577,414.74. The total fixed sum agreed between Dialogue and the plaintiff for the supply of labour in respect of the BPC-BDO project is RM355,618.60 + RM356,663.29 + RM204,516.00 = RM916,797.89.

[83] The court notes the arguments of the plaintiff that since the insulation works awarded by Dialogue to the plaintiff was on a fixed price basis, it was common practice for the subcontract to be also based on fixed price as opposed to hourly rates. However, the court finds that it was not a hard and fast rule that a subcontractor who gets a project on a lump sum basis must also subcontract out on a lump sum basis. It would naturally depend on the facts and circumstances of each contract.

[84] In this case, the court notes the evidence of PW3 to the effect that Ward had approached him to discuss the unit rate for labour in respect of the BPC-BDO project. He did not agree with the rate and further mentioned that when Ward had tendered for the contract, he had gone very low. Tenders are made based on calculations that a profit can be achieved based on the figures tendered. Where tenders are made too low in hopes of securing a contract, problems may well arise later when the prices under subcontracts are not competitive compared with tender prices.

[85] In this case, it is clear that the plaintiff had left much in the hands of Ward. The contract entered into between the plaintiff and the first defendant was a very flexible contract which could be terminated at will without assigning any reasons. With this arrangement, the plaintiff would be able to reduce the number of manpower and equipment at will in line with its own requirements. This flexibility can be clearly seen when the plaintiff asked the first defendant to demobilise on site on 17 May 2002 in order to hire a cheaper subcontractor though it later asked the first defendant to come back on 24 June 2002. The court accepts that such flexibility in dictating the number and amount of manpower and equipment as well as the period of such requirement may well carry with it a higher rate.

[86] In considering whether the actions of Ward were consistent with the actions of a managing director who was doing the best for the plaintiff, the court has considered the reaction of the plaintiff after it allegedly first became aware of the first defendant's claim. When they received the letter dated 30 April 2003 together with the claims summary, they did not confront Ward about either the manpower rates not the equipment rental rates that were claimed. The court is unable to accept the plaintiff's explanation that Ward had left the office and was on his six months' leave period. The court notes that although the plaintiff's letter terminating Ward's employment was signed on 16 May 2003, his termination was only effective 30 November 2003. The court further notes that Ward only received his final settlement payment of £15,592.12 on 15 January 2004 which was way after the plaintiff knew about the so-called exorbitant and unreasonable rates. And yet they paid Ward this not unsubstantial sum of £15,592.12. No show cause letter was ever issued to Ward. The court notes that this, more than anything else, would show that the

plaintiff was not convinced that Ward had done anything wrong in entering the agreement to supply manpower and equipment at the rates claimed by the first defendant.

[87] Looking at the totality of the evidence adduced, the court is unable to find that the plaintiff has succeeded in proving that there was a conspiracy between Ward and the first defendant to injure the plaintiff. The court finds that the mere production of P7 which shows that a motorcycle bearing registration No NAY 8657 was registered in Ward's name but at the first defendant's address, without more, does not amount to proof of conspiracy. On the other hand, evidence as to the actions of Ward in directing the first defendant to demobilise labour in order to save costs and the lack of any positive action against Ward by the plaintiff points to there being no such conspiracy.

Was the plaintiff entitled to a deduction for backcharges?

[88] It is the plaintiff's claim that because Dialogue was unhappy with the performance and quality of the work rendered by the plaintiff, it had imposed a sum of RM1,087,310.10 for backcharges. The plaintiff in turn sought to impose a sum of RM461,248.75 on the first defendant for having to supplement labour for the construction of the boiler and combustion chamber. The plaintiff has admittedly failed to produce any documents to show the breakdown of these charges. The court notes PWl's testimony that he was unable to find any document to evidence that Dialogue had charged the plaintiff RM461,248.75 to supplement labour.

[89] The court has considered both the evidence as well as submissions of the parties on this issue. Whilst there is documentary evidence that Dialogue had imposed backcharges of RM1,087,310.10 against the plaintiff, no document has been produced to show that a sum of RM461,248.75 or any other sum has been expended to supplement labour. The court notes that whilst the plaintiff contends that Dialogue had expressed dissatisfaction with the slow progress in which the first defendant was completing the works as well as the lack of manpower, the first defendant had pointed out that its role was only to supply labour and equipment and it did not have a specific scope of work under the subcontract. As such, the issue of imposing backcharges did not arise.

[90] After carefully considering this issue, the court is inclined to accept the submission of the first defendant that where it is merely contracted to supply labour or rental equipment with no specific scope of work, it cannot be held accountable to share in the backcharges imposed against the plaintiff by Dialogue. The situation would be different if the first defendant was tasked with a particular aspect of the work by the plaintiff but had failed to complete

the work tasked to the satisfaction of Dialogue. Based on the above, the court finds that the plaintiff is not entitled to offset a sum of RM461,246.75 for backcharges.

CONCLUSION

[91] In conclusion, the court finds that a sum of RM1,470,169.30 is due to the plaintiff from the first defendant in respect of the Manjung Power Station project and the Port Dickson project. The court further finds that a sum of RM1,773,785.11 is due to the first defendant under the BPC-BDO project, RM18,993.70 under Prai Power Station project and RM35,000 under Lumut Power Station project. The total thus due from the plaintiff to the first defendant is RM1,827,778.81. In light of the above findings, the court hereby allows the first defendant's counterclaim in the sum of (RM1,827,778.81 – RM1,470,169.30=) RM357,609.51 together with interests and costs as claimed.

First defendant's counterclaim allowed with costs.

Reported by Kohila Nesan